

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE CORTEZ BROWN,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 243635
Kent Circuit Court
LC No. 01-011689-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Two undercover officers identified defendant as the person who sold one of the officers crack cocaine for \$40. Defendant's vehicle was followed by surveillance officers, and eventually uniformed officers apprehended defendant and his passenger. The \$40 was not found on defendant's person or in his vehicle. No cocaine was found in defendant's vehicle. A laboratory analysis established that the substance sold to the officers was crack cocaine.

The trial court found defendant guilty as charged. The trial court noted that while the testimony of the undercover officers who conducted the transaction with defendant differed in some of the details, the officers agreed that defendant sold crack cocaine for \$40. The trial court acknowledged that the \$40 given to defendant was never found, but noted that defendant was out of sight of all officers for a short time, and concluded that the other evidence established defendant's guilt beyond a reasonable doubt. The trial court sentenced defendant to one and one-half to twenty years in prison. The sentence was to be consecutive to the sentences defendant was serving on parole at the time of the offense.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). An objection going to the

great weight of the evidence can be raised only by a motion for a new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Generally, the failure to raise the issue by an appropriate motion waives the issue on appeal. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). However, a defendant convicted in a bench trial need not move for a new trial in order to preserve the issue for appeal. MCR 7.211(C)(1)(c).

The elements of possession with intent to deliver less than fifty grams of cocaine are: (1) the defendant knowingly possessed the controlled substance; (2) the defendant intended to deliver the controlled substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed less than fifty grams. MCL 333.7401(2)(a)(iv); *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

Defendant argues that his conviction was against the great weight of the evidence. We disagree and affirm defendant's conviction. Defendant's primary argument is that the prosecution did not establish that he was the person who sold crack cocaine. The officer who purchased the crack cocaine did not provide a physical description of the seller; however, she stated that she saw the person's face clearly and identified defendant as the seller. The trial court, sitting as the trier of fact, was entitled to accept this testimony as credible. *Lemmon, supra* at 642. Defendant's argument that the arresting officers could not have seen his passenger exit his car because the passenger doors were inoperable is without merit in light of the fact that the arresting officer who testified stated that when he and his partner arrived, defendant and his passenger had already exited the car and were walking away from the scene. The officer did not testify that he observed the passenger alight from the car. The trial court acknowledged that the fact that the \$40 paid for the cocaine was not found was troubling, but correctly noted that defendant was out of sight of the officers for a short time, and could have disposed of the money in some way. The uncontradicted evidence showed that the substance sold by defendant was crack cocaine in a mixture weighing less than fifty grams. That evidence, coupled with the purchasing officer's unequivocal testimony that defendant was the person who sold her the cocaine, established defendant's guilt beyond a reasonable doubt. The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski, supra*. Defendant is not entitled to a new trial.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood